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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
(SAN JOSE DIVISION)

GPNE, CORP.

Plaintiff,

v.

APPLE INC.,

Defendant.

Case No. C 5:12-cv-02885-LHK

**APPLE INC.'S ADMINISTRATIVE  
MOTION FOR LEAVE TO FILE A SUR-  
REPLY IN OPPOSITION TO GPNE  
CORP.'S MOTION TO COMPEL (DKT.  
120)**

Date: December 17, 2013  
Time: 10:00 a.m.  
Judge: Magistrate Judge Paul Grewal  
Location: Courtroom 5, 4th Floor

Pursuant to Local Rule 7-11(a), Defendant Apple Inc. respectfully moves for leave of Court to file a six-page sur-reply to address new facts not presented in Plaintiff GPNE Corp.'s ("GPNE") opening brief, to correct misstatements of fact and circumstances surrounding Apple's production of log files, and to address GPNE's shift in the relief that GPNE now requests in its Reply in Support of GPNE's Motion to Compel (Dkt. No. 146). Attached hereto as Exhibit 1 is Apple's proposed Sur-Reply to the Reply ("Apple's Sur-Reply"). Attached hereto as Exhibit 2 is the Declaration of Christopher O. Green in Support of Apple's Sur-Reply, and attached hereto as Exhibits 3 and 4 are Exhibits CC and DD to the Declaration of Christopher O. Green in Support of Apple's Sur-Reply. The Declaration of Jacqueline Tio in Support of Apple Inc.'s Motion for Leave to File Sur-Reply in Opposition to GPNE's Motion to Compel is filed concurrently herewith.

Apple takes very seriously any allegation of spoliation, particularly where, here, GPNE is seeking an open-ended extension of time to the case schedule and the extreme sanction of an adverse jury instruction. These allegations are particularly of import here, where GPNE seeks to impose an adverse inference contradicted by documents produced to GPNE before the discovery cut-off date, *see, e.g.*, Ex. T to Apple's Opp'n (Dkt. Nos. 139-21 & 140-14), and where GPNE's motion is premised on mischaracterizations of facts that are not readily available to the Court.

Apple has—both before and after the filing of this motion—cooperated and made available for inspection the log files that GPNE continues to mischaracterize to the Court. Apple has gone to great lengths to cooperate with GPNE, and its efforts should have resulted in the withdrawal of the present motion. Instead, in its Reply, GPNE alleges new misstatements of fact (including a declaration from an expert not disclosed until after GPNE filed this motion and opening brief),<sup>1</sup> makes new arguments, and seeks relief different from that originally requested, and consequently, Apple has not had an opportunity to address these arguments and their attendant authority.

Good cause therefore exists to grant Apple's request. *See, e.g., Landmark Screens, LLC v. Morgan, Lewis & Bockius*, No. 08-cv-2581 (JF), 2010 WL 3629816 at \*2 (N.D. Cal. Sept. 14,

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<sup>1</sup> GPNE filed its motion on November 7, 2013, and subsequently corrected this filing on November 12, 2013. *See* Dkt. Nos. 117, 119, 120.

2010) (sur-reply permitted where authority cited for first time in reply papers); *Altavion, Inc. v. Konica-Monolta Sys. Lab., Inc.*, No. 07-cv-6358 (MHP), 2008 WL 2020593 at \*1 n.1 (N.D. Cal. May 8, 2008) (sur-reply permitted where reply papers “relied upon cases which had not been previously cited”) *Toomey v. Nextel Commc’ns, Inc.*, No. C-03-2887 MMC, 2004 WL 5512967 (N.D. Cal. Sept. 23, 2004), at \*1 (sur-reply permitted to address new arguments and misstatement of facts); *Sharper Image Corp. v. Consumers Union of U.S., Inc.*, No. 03-4094 (MMC), 2004 WL 2713064 (N.D. Cal. Feb. 23, 2004) at \*1 (similar).

Apple contacted counsel for GPNE on December 6, 2013, and GPNE sought additional information from Apple as to the substance of its sur-reply. Apple provided this information to GPNE on December 10, 2013, and on December 11, 2013, GPNE responded that it would oppose this administrative motion. Thus, Apple could not obtain a joint stipulation for this request.

For the foregoing reasons, Apple respectfully requests that the Court grant leave to file the Sur-Reply attached hereto as Exhibit 1, the corresponding Declaration of Christopher O. Green in Support of the Sur-Reply attached hereto as Exhibit 2, and exhibits to the same attached hereto as Exhibits 3 and 4.

Dated: December 12, 2013

FISH & RICHARDSON P.C.

By: /s/ Christopher O. Green  
Christopher O. Green

Attorneys for Defendant  
APPLE INC.